APR 4 1956
HAROLD B. WILLEY, Cler

IN THE

Supreme Court of the United States

October Term, 1955
No. 812

JOHN OOSTEN,

Plaintiff and Respondent,

vs.

HAY HAULERS, DAIRY EMPLOYEES AND HELPERS UNION, LOCAL UNION NO. 737, A. F. of L.; PLANT AND CLERICAL DAIRY EMPLOYEES UNION, LOCAL UNION NO. 93, A. F. of L.; KNUDSEN CREAMERY COMPANY OF CALIFORNIA, a corporation, THOMAS C. CASE, JACK MENAGE, AL MOEN and MARK WHITING, JOHN DOE 1 to 10, INCLUSIVE OF ALL INTERVENING MEMBERS AS THOUGH EACH JOHN DOE WERE SEVERALLY AND SEPARATELY DESIGNATED,

Defendants.

KNUDSEN CREAMERY CO. OF CALIFORNIA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI.

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HAY HAULERS DAIRY EMPLOYEES & HELPERS UNION, etc., *et al.*,

Defendants,

KNUDSEN CREAMERY CO. OF CALIFORNIA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI.

THOMAS G. BAGGOT, on behalf of petitioner, Knudsen Creamery Co. of California, prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in the above case on December 23, 1955, rehearing denied January 23, 1956.

1. Opinions Below.

The trial court, the Superior Court of the County of Los Angeles (Hon. Frederick F. Houser, J.), rendered no opinion but made findings [Clk. Tr. 25-34] and rendered a decision [R. 1139-1144]. The majority opinion (Hon. Jesse W. Carter, J.) of the Supreme Court is reported in 45 A. C. No. 24, 809 and the dissenting

opinion (Hon. Douglas L. Edmonds, J.), *id.* page 818 (App. A, B). The opinion of the District Court of Appeal, Second Appellate District, Division One, while not a part of the record, is reported 278 P. 2d 744 and is set forth in App. D.

2. Jurisdiction.

The judgment of the Superior Court of the County of Los Angeles was made August 11, 1953, and entered August 17, 1953, and a copy is set forth in App. C. This judgment was affirmed by the Supreme Court of California (4 justices to 3) December 23, 1955. Petitioner's application for rehearing was denied by said court January 23, 1956, and the remittitur was filed in the Superior Court Clerk's Office, Los Angeles County, January 24, 1956. Thus, there are no further remedies available to petitioner in the state courts and the jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1257(3).

3. Questions Presented.

(a) In this action brought by respondent against petitioner and two union locals and others, in the Superior Court, County of Los Angeles, for breach of contract to purchase milk, did the affirmance by the Supreme Court of California of the judgment of the trial court awarding $20,314.19 damages in favor of respondent and against petitioner and dismissing the action as to the other defendants amount to a denial of due process to petitioner?

(b) Similarly, did the affirmance of that judgment, upholding the Constitutional rights of petitioner's employees to refuse to accept and handle respondent's milk

at petitioner's plant, which refusal directly caused the action leading to the judgment against the petitioner, and at the same time denying petitioner's duty to recognize and accept the exercise of these Constitutional rights by its employees, amount to a denial of equal protection of the law to petitioner?

4. Constitutional Provision Involved.

Petitioner contends that the aforesaid judgment and decisions of the state courts amount to a denial of due process and equal protection of the law as guaranteed to it by Article XIV, Section 1, of the Federal Constitution.

5. Statement.

Petitioner is engaged in the business of distributing and processing milk and dairy products in central and southern California [R. 628]. Its daily requirements for milk amount to about 500,000 lbs., most of which it obtains from producers in the milk shed around the City of Los Angeles where petitioner's main plant is located [R. 477, 478]. Petitioner had a contract with respondent to take all the milk produced by his dairy herd of over 300 head [R. 41, 42]. Clause 12 of this contract is at issue in this case and provides substantially as follows:

> "In case of strike, lockout, or other labor trouble (whether the parties hereto are directly or indirectly involved) . . . which shall render it impossible for Seller to deliver, or Buyer to handle or dispose of such milk, no liability for non-compliance with this agreement caused thereby during the time of continuance thereof shall exist or arise with respect to either party hereto." (App. A, p. 1.)

In July, 1951, the business agent of Local No. 737 of Hay Haulers, Dairy Employees and Helpers Union (hereafter called Local 737)[1] solicited an agreement with respondent to cover his employees [R. 60]. Respondent demurred at first and finally refused [R. 65], whereupon Local 737 commenced picketing at respondent's dairy farm and branded respondent as "unfair" [R. 66, 70]. At this time and for some time previously, under a master agreement [R. 633 *et seq.*] with the Teamsters Union, petitioner's plant and office workers were all members of Local 93 of the Plant and Clerical Dairy Employees (hereafter called Local 93)[1] [R. 484, 511]. Likewise all other non-supervisory employees of petitioner were members of various A. F. of L. locals [R. 136].

The chief ground of respondent's refusal to deal with Local 737 was that he had signed an agreement with the Dairy Workers Union of the Christian Labor Association [R. 48] which was held by the trial court to be a labor organization [R. 1139] but not recognized as such by Locals 737 and 93 [R. 10]. The trial court further found [Clk. Tr. 26] that the Dairy Workers Union was not "interfered with, dominated or controlled by the plaintiff employer, John Oosten. . . ." Subsequently, however, the trial court also found [Clk. Tr. 29] that "The plaintiff-employer, after the commencement of his controversy with the Hay Haulers Union[2] (A.F. of L.), *took the leading part in having his employees join the Dairy Workers Union* * * * and within a few days thereafter signed a contract with the Dairy Workers Union. * * * *" (Emphasis supplied.) It is submitted that

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[1]Member of the Teamsters Union, A. F. of L.

[2]Local 737.

reconciliation of these two findings could engage the attention of only the fondest devotee of Scholasticism.

When respondent's milk was branded unfair he knew that it would be impossible for him to dispose of his milk to any major creamery in the Los Angeles area [R. 138][3] since all of these large distributors and processors were bound by the master agreement with the Teamsters [R. 385, 631, 632]. Nevertheless, on several occasions between August 6, when his milk was branded "unfair" and sometime in early October, 1951, respondent sought to deliver his milk to petitioner's plant [R. 70, 73, 77, 210-215]. On each of these occasions, petitioner's employees, though ordered to do so, refused to unload or handle respondent's milk [R. 71, 75, 80, 82, 550, 557]. In consequence, respondent testified that he was forced to sell it to the only non-union creamery in this area, realizing a lower amount than that which petitioner would have paid [R. 92, 101]. And in anticipation of just this situation, respondent had made arrangements with the Excelsior Creamery, a non-union distributor, the day before he made the first attempt to deliver his "unfair" milk to petitioner [R. 1023, 1025].

Twice during this period respondent applied for and obtained injunctive orders restraining Locals 737 and 93 from interfering with the handling of his milk at petitioner's plant [R. 76, 78] but petitioner's employees persisted in their refusal [R. 76, 80, 621] as respondent knew they would [R. 138, 139]. The second injunction was mandatory and contained the followed provision:

> "IT IS further ORDERED that the KNUDSEN CREAMERY CO. OF CALIFORNIA, a corporation, its officers,

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[3]This was also conceded by respondent's counsel [R. 8, 984, 1014].

agents and employees receive and handle milk delivered to said KNUDSEN CREAMERY CO. OF CALIFORNIA, a corporation, its officers, agents and employees by the plaintiff."

It is significant that the mandate was directed to the "employees" of respondent *qua* employees, not as members of Local 93. It is the tenor of the decision below that petitioner did not press its employees to handle this milk. It seems a strained decision which holds that a mere corporation, or rather its management, possesses greater powers than the Superior Court of Los Angeles County out of which this mandatory injunction issued.

Respondent, as plaintiff, commenced an action against petitioner, Locals 737 and 93, the individual business agents of the locals and the members of Locals 737 and 93, as a *class*,[4] as defendants, in the Superior Court of Los Angeles County, August 10, 1951, four days after Local 737 declared his milk unfair. In addition to the injunctive relief sought to restrain defendants from interfering with his milk and to compel petitioner as well as Local 93 to handle his milk, respondent sought money damages against defendants for breach of his contract with petitioner [Clk. Tr. 8].

Trial of the action was begun in the Superior Court November 19, 1951, and occupied each court day thereafter until December 3, 1951, when the court, on its own motion and over petitioner's objection, continued the cause until April 1, 1952 [R. 946]. Trial of the case was ultimately completed April 28, 1953 [R. 1128, 1138] and resulted in a judgment in favor of respondent for

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[4]Pars. II and III of the complaint [Clk. Tr. 2] and California Code of Civil Procedure § 382.

$20,314.19 (App. C), representing the difference between the contract price and the price which respondent actually received for his milk.[5] At the same time, the court dismissed the action against Locals 737 and 93 as well as the individual defendants, including the members of Locals 737 and 93. The question of injunctive relief had become moot because respondent had sold his dairy herd previously on March 15, 1952 [R. 1031].

Locals 737 and 93 and the individual defendants mainly relied upon the defense that petitioner's employees were acting in their *individual* capacities and that their refusal to handle respondent's milk was not as the result of union direction or action of any kind [R. 358, 364, 486, 487]. Case, one of the defendants and business agent for Local 737, read a letter or memorandum to petitioner's employees relating to the dispute between respondent and Local 737 [R. 399-401] which contains this language:

> "We are taking this opportunity to bring you up to date on the dispute which has existed and is presently still existing between Hay Haulers, Dairy Employees & Helpers Union Local 737 of the Teamsters and John Oosten, a dairyman. As you know, John Oosten signed a contract with the Christian Labor Association, an organization that pretends to be a labor union. Local 737 has been picketing Oosten's dairy because he refused to negotiate with Local 737 on behalf of his employees who were members of Local 737. On August 10 of this year in order to stop Local 737 activities John Oosten filed suit against Local 737, against your union Local 93

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[5]The only reason for this price differential was that respondent's milk would not be handled by any major creamery since it was "unfair"; at the time, milk was in short supply and except for its "unfairness" respondent's milk would have been readily marketable at no loss to him [R. 1103].

and against the Knudsen Creamery Company. On August 27 John Oosten got an injunction to stop Local 737 from picketing John Oosten. Yesterday, September 7, 1951, they got another temporary injunction against Local 737 and your union, Local 93, to prevent the unions from taking any coercive means to prevent you from handling milk delivered by John Oosten or coming from John Oosten.

"We want you to understand that this does not mean that the court has ordered you to handle this milk.

"It means that neither union nor any business agent nor official of the union can order you not to handle the milk on threat of any punishment, suspension, fine or any other penalty for not handling the milk. As an American citizen you have the right to decide as individuals whether you want to handle the milk coming from John Oosten's dairy. Each one of you has the right to decide whether you will handle the milk or refuse to handle the milk. As you know in our contract with Knudsen Creamery as in our contract with all dairies it is provided that the employer cannot discriminate against you for upholding the principles of the A.F. of L. If you feel that it would be upholding the principles of the A.F. of L. to refuse to handle this milk you may refuse to handle it and no one will punish you for it or discriminate against you for it. By the same token, if you decide as individuals that you want to handle the milk coming from John Oosten's dairy, regardless of the dispute which exists between this dairy and Local 737, you also may feel free to do that too. We are telling you this so there will be no doubt in your mind. The decision is up to you to make freely and according to your own conscience and there will be no retaliation against you by anyone, no matter which decision you reach."

Furthermore, representatives of the Teamsters Union at a conference with petitioner's representatives advised the latter that petitioner's employees would refuse to handle respondent's milk so long as it was unfair and that petitioner had no right to discriminate against its employees for this refusal, since they had a right to uphold the principles of the A.F. of L. [R. 486, 487, 645]. One of these principles was the right asserted by petitioner's employees to refuse to handle goods or products labeled unfair by another local—in this case Local 737 [R. 402, 406, 487]. In support of its defense of impossibility as defined in Section 12 of the contract, petitioner called 50 employees as witnesses [R. 679-944]. All but a few knew of the dispute between respondent and Local 737 and unequivocally and emphatically stated that they would not handle respondent's milk. One employee expressly proclaimed that he would rely on his Constitutional rights [R. 696]. In addition to the employees who testified in person, in order to cut down the time of the trial it was stipulated that if 160 more of petitioner's employees were called to the stand each would testify in substance that he would not handle respondent's milk [R. 950; Clk. Tr. 15-24].

Respondent's counsel in his opening statement [R. 8] and during the trial, the trial court [R. 266], virtually conceded that it would have been impossible for respondent to bring about delivery of his milk at petitioner's plant.

Respondent himself testified that he knew that petitioner had a union shop [R. 136] and that no union shop would handle his milk [R. 138]. On two occasions when he personally sought to deliver his milk to petitioner's plant, respondent admitted the impossibility

of inducing or requiring petitioner's employees to unload the milk [R. 138, 139].

Despite this overwhelming evidence, the trial court arbitrarily chose to give it very little, if any, weight [R. 749-757]. Yet the trial court manifestly believed the testimony of the union representatives to the effect that refusal by petitioner's employees to handle respondent's milk was not union action, but "individual" action, which the individual employees had a Constitutional right to pursue.[6] Furthermore, according to the reasoning of the trial court, and adopted by the court below, petitioner was required to acknowledge the right of its employees, as individuals, to refuse to handle respondent's milk. Since the employees acted as individuals, not as members of Local 93, the latter was not liable. On the other hand, by a species of juristic legerdemain, these same acts in relation to petitioner lose their individual quality and become acts of its employees for which petitioner, as employer, is held accountable in damages.

Quite aside from the fact that the court's reasoning in reaching this result would seem to stultify the judicial process, holding, as it does, the innocent bystander solely responsible in damages to one of the active participants in a dispute over which it had no control and in which it had no direct interest, it is submitted that the decision

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[6] "Q. As a matter of fact, Mr. Case, when you read this memorandum to the people at Knudsen's you hoped they would handle the milk, didn't you?"

* * * * * * * * *

"Q. Hoped they wouldn't handle the milk, didn't you? A. Certaintly I hoped they wouldn't." [R. 406]

The memorandum referred to is that advising Knudsen's employees of their right to engage in "individual action" in not handling respondent's milk [R. 339-401].

establishes a precedent capable of supporting great mischief in the field of labor relations. And this precedent has been created by a bare majority of one in the Supreme Court of California.

Now, by virtue of the judgment sought to be reviewed, it is the law in California that so long as members of a union are acting *individually*, the union or local is *prima facie* absolved from responsibility and the employer must respect and recognize an employee's right to pursue such individual action. At the same time, the employer must accept the risk of being held in substantial damages for acting in accordance with the law as it is thus proclaimed to be by the majority of the Supreme Court of California.

Petitioner here seeks to have this Court remove it from the horns of the dilemma upon which it has been impaled by this decision and upon which it and others may also find themselves impaled at any time.

Counsel for petitioner in his opening statement [R. 13] explained how the Constitutional rights of petitioner's employees were involved. In fact, fundamental considerations of Constitutional principles were implicit in the case. Furthermore, since petitioner was successful in its appeal to the District Court of Appeal, its Constitutional rights were vindicated. When, however, the Supreme Court of California took cognizance of the case, the decision and action of the District Court of Appeal became *functus officio* (California Constitution, Art. VI, Secs. 4, 4b). Thus, it was not until the majority of the Supreme Court of California affirmed the judgment of the trial court that petitioner's Constitutional rights were in fact denied. Petitioner raised the question of the effect on its rights guaranteed by the Fourteenth Amendment in

its petition for a rehearing before the Supreme Court of California (*Cf.* App. E), but to no avail.

It is submitted that this was timely and that petitioner should not be barred from having its day in this Court to review a decision of such far-reaching consequences. Furthermore, where a Constitutional question has been raised for the first time on a petition for rehearing to the Supreme Court of California this Court has issued its writ of certiorari. *Lisenba v. California,* 314 U. S. 219 (1940).

6. Reasons for Granting the Writ.

(a) Due Process.

Petitioner maintains that the result of the affirmance by the Supreme Court of California of the judgment against it for $20,314.19, under the peculiar circumstances of this case, amounts to a denial of due process.

Section 12 of the milk purchase contract (*supra,* p. 3) provides in effect that if either party is involved directly or indirectly in labor trouble so as to render performance impossible there shall be no liability for noncompliance. In addition to the phrase "labor trouble" the words "strike" or "lockout" are included to excuse nonperformance because of impossibility. A strike or a lockout, in and of itself, would "render it impossible for Seller to deliver, or Buyer to handle" milk. Thus, the phrase "labor trouble" is robbed of any significance unless it is taken to refer to threats of a strike or walkout or to a secondary boycott. It is submitted that the record here establishes beyond the shadow of any reasonable doubt that petitioner was both threatened with a strike by this device of "individual action" and was directly prevented from performance by a secondary boycott when

its employees refused to handle respondent's milk because it had been branded unfair. In fact, if we define "strike" as a refusal to work as a means of protecting or asserting a right claimed by an employee, petitioner was "struck" when its employees, whose job it was to do, refused to accept respondent's milk in the plant,—obviously the first link in the chain from the producer (respondent) to the ultimate consumer.

It was suggested by the majority in their opinion below that petitioner did not go far enough in seeking to require its employees to accept and handle respondent's "unfair milk." This reasoning not only ignores reality, but is refuted by the record. Petitioner's employees not only refused to obey petitioner's orders to handle the milk, but they also refused to recognize the injunctions issued by the Superior Court, one of which was mandatory (*supra*, pp. 5, 6). Any attempt to force or coerce the employees would have constituted an attempt to impose involuntary servitude upon them.[7] Thus, labor trouble had rendered it impossible for petitioner "to handle or dispose of such milk."

The effect of the decision of the majority below was to deny petitioner the benefit and protection which the parties intended to create by Section 12 of the contract.

It is fundamental to the doctrine of due process that no court shall deprive any party of a substantive right arbitrarily or capriciously. This Court has been zealous in examining the records of litigation carried on in State courts where there is a showing that a reasonable basis

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[7]This Court has recently condemned "a flagrant example of interference by the employer with (an) expressly protected right of the employees * * *." *Mastro Plastics Corp. v. N. L. R. B.*, 76 S. Ct. 349, 355 (1955).

exists for supposing that rights guaranteed by the Federal Constitution have been denied or ignored. *Dixon v. Duffy*, 344 U. S. 143, 145 (1952); *Jennings v. Illinois*, 342 U. S. 104 (1951).

In *Craig v. Harney*, 331 U. S. 367, 373 (1946), this Court said:

> "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made. (Citations.)"

A state court, in matters which are generally of concern to the state alone cannot defeat the jurisdiction of this Court, by findings "screening reality," *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 293 (1940); or by failure to indicate whether its decision included the decision of a question involving rights guaranteed by the Federal Constitution, *Honeyman v. Hanan*, 300 U. S. 14 (1936); or by ambiguous or obscure adjudications, *Minnesota v. National Tea Co.*, 309 U. S. 551 (1939).

Petitioner submits that the effect of the decision below is to create a "no man's land" in the field of labor relations, where, so long as a union can support the fiction of "individual action," it has no responsibility under the law and an employer, situated as was petitioner, is left sans remedy and sans redress. It is basic in our concept of Anglo-Saxon law that tyranny of the few or of the many is repugnant to a free society. It is equally basic to our national concept of Constitutional law that due process is fundamental to the true administration of justice. *Cf. Pennoyer v. Neff*, 95 U. S. 714 (1877).

Petitioner, in the case at bar, was in nowise a party to the dispute between respondent and Local 737. It had no right to judge between respondent and the union. Yet it was forced into the litigation by respondent by the issuance of process against it. And having been catapulted into the fray from the role of spectator to that of a principal actor it was denied the use of its sole weapon of defense—the impossibility clause of the contract.

Upon well-founded and long-standing principles it is contended that this is a clear, albeit unusual, case of the denial of due process and calls for the issuance of the writ prayed for in the petition.

(b) Equal Protection.

Article 2, section 3, of the master agreement to which petitioner and Local 93 were parties provides as follows [R. 636]:

> "Employer agrees not to discriminate against any member of the union for upholding the principles of the American Federation of Labor."

One of these basic principles is that no member of a union can be compelled to handle unfair products [R. 486, 487, 645]. Had petitioner attempted coercion of its employees because of their refusal to handle respondent's milk, it would have been held to have violated this section of the master agreement. *Cf. United Association of Plumbers, etc. v. Graham,* 345 U. S. 192 (1952).

While it is true that the doctrine of equal protection commonly is invoked in cases involving legislative action, it by no means follows that the field of judicial action is exempted from its sanctions.

In *Hansberry v. Lee,* 311 U. S. 32 (1940), this Court, in reversing the Supreme Court of Illinois, held that the

state court had erroneously applied the doctrine of *res judicata*, thus denying petitioners the Constitutional rights guaranteed by the Fourteenth Amendment. Petitioners were seeking to escape the effect of a restrictive covenant against the sale of land to negroes. The Illinois courts held that petitioners were bound by a prior judgment, in an action to which they were not parties, upholding the validity of the challenged covenant. The basis for the Illinois decision was that petitioners were engaged in a *class* action and that petitioners, as property owners of the land affected by the covenant, were bound by the prior decision. This Court pointed out that in the circumstances the Illinois court in applying the theory of class actions had deprived petitioners of rights guaranteed by the Fourteenth Amendment, since in the prior case, the plaintiffs had been seeking to uphold the covenant, whereas in the instant case, petitioners were seeking to overthrow the restrictive covenant.

It is submitted that the effect of the decision of the Supreme Court of Illinois in the case just cited was to deny petitioners the equal protection of the law.

In any event it seems clear that this Court will review a single violation of a Constitutional right, stemming from a judicial decision, as well as a series, or the threat of a series of violations stemming from legislative or other action. *Hansberry v. Lee* (*supra*); *Copperweld Steel Co. v. Industrial Comm. of Ohio*, 324 U. S. 780 (1945). *Cf. Hague v. C.I.O.*, 307 U. S. 496 (1938); *Niemotko v. Maryland*, 340 U. S. 268 (1950).

It is well established that judicial decisions by state courts are deemed to be State action within the sanctions of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U. S. 1, 14 (1947).

In holding that the action of the state courts in enforcing covenants restricting sale of land to persons of the Caucasian race constituted a denial of equal protection of the law, this Court in *Shelley v. Kraemer, supra,* said page 20:

> "We hold that in granting judicial enforcement of the restriction agreements in these cases, the states have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."

In the case at bar, both the trial court and the majority of the Supreme Court of California held that petitioner's employees in refusing to handle respondent's milk were acting as individuals and not as members of Local 93. Hence, Local 93 was not liable to respondent. In the same breath, however, petitioner was held responsible for the identical acts of these same individuals as employees. Thus, in the same case, between the same parties, the identical acts of the same individuals have different legal consequences as to each of two similarly situated co-defendants. Here, it is submitted, is a discrimination equally as flagrant as that condemned by this Court in *Hansberry v. Lee* (*supra*) and in *Shelley v. Kraemer* (*supra*). Clearly, if the acts of petitioner's employees were "individual" as to Local 93, the identical acts of the same individuals should not be tortured into the acts of employees as to petitioner for the sole purpose of fastening liability upon it and providing a subsidy to respondent in his struggle with the union.

In failing to treat Local 93 and petitioner alike, the court below by its decision has denied petitioner the equal protection of the law guaranteed by the Fourteeth Amendment to the Federal Constitution.

Petitioner's employees, Lorge, Breum and Krug, whose duty it was to unload respondent's milk, refused to do so [R. 116]. They, too, were defendants in this class action. But the majority of the court below has exonerated their conduct and transferred the liability for their "individual actions" to petitioner.

Surely there can be no validity in this theory of "individual action," unless it be founded upon a doctrine of individual responsibility. It is submitted that this Court should exercise its undoubted power to correct so palpable an injustice.

Conclusion.

For the reasons set forth above and because of the far-reaching consequences of the precedent established by the decision below, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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